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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 325.

A. P. HUDSON AND H. ISAIAH SMITH, SPECIAL RECEIVERS, ETC., PETITIONERS,

VS.

H. E. GRANT, L. H. BROOKS, TRUSTEE, ELBRIDGE W. PALMER AND R. L. MALONEY, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

BRIEF FOR THE RESPONDENTS, L. H. BROOKS, TRUSTEE, ELBRIDGE W. PALMER AND R. L. MALONEY IN SUPPORT.

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Of Counsel.

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Respondent, L. H. Brooks, Trustee, was one of the original complainants who filed the bill in the Chancery Court of Davidson County, Tennessee. Respondents, El-

bridge W. Palmer and R. L. Maloney, filed claims in the Chancery Court and with L. H. Brooks, Trustee, filed a petition for certiorari in the Supreme Court of Tennessee (R. p. 115). They are advised that the error of petitioners in naming the three original complainants below as respondents has been corrected so that these three contract holders who carried on the contest in the Supreme Court of Tennessee are respondents here.

This brief is filed in support of the petition.

OPINIONS BELOW.

The original opinion of the Supreme Court of Tennessee is printed at page 135 of the Record. The opinion of the Supreme Court of Tennessee on the first petitions for rehearing is printed at page 161, and opinion of the Supreme Court on the second petitions for rehearing is printed at page 180. None of these opinions were for publication. The opinion of the Court of Appeals of Tennessee (the intermediate Appellate Court) is printed at page 98 of the Record, and the opinion of the Chancellor is printed at page 52 of the Record.

JURISDICTION.

The jurisdiction of this Court is invoked under Sections 236, and 237 of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U. S. C. A., Sec. 344(b)).

QUESTIONS PRESENTED.

1. Whether the Supreme Court of Tennessee denied due process to these respondents, by setting aside the

decree of the Chancery Court directing the distribution of the deposit fund in the State of Tennessee among the holders of contracts having cash surrender values, on the appeal of H. E. Grant taken after the expiration of the statutory time for appeal had expired.

2. Whether the Supreme Court of Tennessee, by construing the Tennessee deposit statute as securing all contracts sold by the Investment Company in the State of Tennessee to the extent of payments thereon, impaired the obligation of petitioners' contracts which were in effect before the deposit statute was enacted, and by the express terms of which the Investment Company agreed to maintain a reserve fund to secure the full amount of the cash surrender values of its outstanding contracts.

STATUTES INVOLVED.

The issues involve the construction and application of Section 3, Article 9, Chapter 33, of Michie's Code of West Virginia, 1941, and the provisions of Section 6057, Tennessee Code, as amended by Chapter 209, of the Public Acts of 1939, Tennessee Legislature. Also involved are the contract clause, Section 10, Article I, of the Constitution of the United States, the first Section of the Fourteenth Amendment of the Constitution of the United States, and the Fifth Amendment to the Constitution of the United States.

STATEMENT.

At the time of the insolvency of Fidelity, the deposit fund in the State of Tennessee was sufficient to pay the cash surrender values on all contracts sold in the State of Tennessee. It was much smaller than the aggregate

amount of payments on these contracts. Some of the contracts—in which class were the two held by H. E. Grant—had no cash surrender values because payments had not been made for as long as twelve months.

The contracts of respondents, L. H. Brooks, Trustee, Elbridge W. Palmer, and R. L. Maloney, were old contracts. The Chancellor's decree directing a distribution of the fund on the basis of cash surrender values gave them the security which the Company had agreed, by the contracts, to maintain for their benefit.

The decree of the Supreme Court, by directing a *pro rata* distribution of the deposit fund so as to allow all contract holders to participate to the full extent of their payments (though payments were in excess of cash surrender values or the contracts were without any cash surrender value at all) cut down materially the amounts which respondents would receive on distribution of the fund.

The Chancellor's decree settling the distribution on the basis of cash surrender values, was reversed by the Supreme Court on appeal of a single contract holder, H. E. Grant, whose contract had not attained a cash surrender value. No insistence was made by Grant that the Chancellor erred in adjudging cash surrender values to be the basis of distribution, until after the statutory period of 30 days from the date of the Chancellor's decree had elapsed[1]. Grant was not designated as representative of any class of contract holders. He appealed simply in his own right. The appeal was entertained in the Appellate Courts notwithstanding the tender to Grant for the full amount of his claim.

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[1]The term in which the decree had been entered had also expired.

ARGUMENT.

Respondents' interests have been represented by the West Virginia Receivers ever since the decree of the Chancery Court was rendered on December 10, 1943, adjudging that the Tennessee deposit should be distributed on the basis of cash surrender values. They adopt the petition and brief in support thereof filed in this Court by the West Virginia Receivers. In order to more adequately raise their contentions that their constitutional rights were violated by the arbitrary reversal of the Chancellor's decree by the Supreme Court of Tennessee, contrary to settled usage and practice in the Courts of Tennessee, they file this supporting brief.

I.

The Chancellor's decree entered on December 10, 1943, (R. p. 50) settled the principles of distribution and adjudged the rights of the several claimants to the fund. After the lapse of thirty days from the date of its entry, the Chancellor's power to make any revision of that decree was ended. It was as much beyond the power of the Court to change as if it had been a final decree.

The Tennessee rules of practice on this point have been in effect without change for a long period of time and are free from doubt. The authoritative treatise on chancery practice is Gibson's Suits in Chancery, published first in 1907. In the fourth edition, 1937 (the latest edition), it is stated:

> "Sec. 572. When a Decree May Be Changed.—A decree is inchoate, and has no force whatever, until it has been entered on the minutes; and even

after it has been entered on the minutes, and the minutes signed, it is completely within the power of the Chancellor until the end of the term, unless the term continues longer than thirty days after the entry of the decree, and then until the end of thirty days. During this period, the Chancellor may modify, amend, add to, subtract from, or make any other change in, the decree he may deem proper, and may even absolutely vacate it, and restore the cause to the docket; or he may vacate the decree and have one entered in favor of the other party. These changes, or reversals, of the decree may be on the Chancellor's own motion, or on reargument or reconsideration, or on a formal rehearing on a petition filed for that purpose. * * *

"But after the lapse of the thirty days after its entry, or after the close of the term, the Chancellor's power to make any revision of a decree settling rights is forever ended, except on a bill of review, or on a bill to impeach the decree for fraud, no matter how manifest and gross the error, nor how certain he may be of its existence. The decrees of Fate are not more beyond his power of change. His right thereafter to rectify a decree, as shown in the next section, is rather clerical in its nature than judicial, such rectification not requiring any exercise of discretion, and not embracing any redetermination of any matter.

"An order or decree made by consent cannot be modified or varied, in an essential part, without the assent of all the consenting parties. The Court may, however, upon the application of either party, give such further directions as shall become necessary for the purpose of carrying such order or decree into effect, according to its spirit and intent.

"An interlocutory order or decree that settles a principle, adjudges a right, or determines an issue, especially if made upon a hearing of the cause, is, after the lapse of thirty days, or after the adjourn-

ment of the term, as much beyond the power of the Court to change it as is a final decree * * *."

The latest decision of the Supreme Court affirming this rule of practice is *Battle et al.* v. *National Life & Accident Insurance Company*, 178 Tenn. 283, 157 S. W. 2d 817.

We quote from the opinion as follows:

"(1) Unquestionably the circuit court was without jurisdiction on March 17, 1941, to set aside the judgment of August 10, 1939, in which the rights of the parties were adjudged and a reference ordered as to premiums paid by plaintiffs and the sums paid them by defendant under the disability or other provisions of the policies. In other words, the court found that the defendant was indebted to plaintiffs, but ordered a reference as to the amounts of such indebtedness.

"In *Mayor, etc., of Morristown* v. *Love*, 160 Tenn. 177, 183, 184, 22 S. W. 2d 769, 770, the Court quoted approvingly from *Citizens' Bank & Trust Co.* v. *Bayles*, 153 Tenn. 40, 50, 281 S. W. 932, the following:

"(2) 'While the line between interlocutory decrees, subject to be revised at a subsequent term, and those not subject to such reconsideration, cannot be scientifically defined, yet it may be stated as the general rule that, if such interlocutory decrees settles a principle, or adjudges a right, or determines an issue, then, in such case, it is not open for revision at a subsequent term. *Allen* v. *Shanks*, 90 Tenn. 359, 16 S. W. 715; *Boyd* v. *Sims*, 87 Tenn. 771, 11 S. W. 948; *Johnston* v. *Hanner*, 70 Tenn. (2 Lea) 8; *Meeks* v. *Mathis*, 48 Tenn. (1 Heisk.) 534; *Vaccaro* v. *Cicalla*, 89 Tenn. 63, 14 S. W. 43.

" 'If, however, it be a mere order adjudging no issue—as an order concerning the preparation of the

cause, or an order granting an injunction, or dissolving or modifying one—such orders are subject to revision and reconsideration at the subsequent term for they are in no sense an adjudication of rights. *Allen* v. *Shanks, supra.*

" 'These decisions are justified under Section 4699 of Shannon's Annotated Code, which is as follows:

" ' "A judgment or decree may be interlocutory or final to be determined by the subject-matter and substantial purport thereof."

" 'In other words, all interlocutory decrees which determine an issue shall be treated as final and not subject to review at a subsequent term.' "

By the undisputed authorities, if the Chancellor had undertaken to make any change in the decree of December 10, 1943, after thirty days elapsed, he would have been acting illegally and without jurisdiction.

The exceptions of the appellant, H. E. Grant, to the report of the Clerk and Master, made in execution of this decree (R. p. 65) if sustained, would have required the reversal of the Chancellor's decision embodied into the decree of December 10, 1943. These exceptions were properly overruled by the Court (R. p. 67).

It would be a rank anomaly that the Chancellor's power to revise the decree should be ended with the elapse of thirty days from the date of its entry and that the decree should remain subject to revision by the Court of Appeals or the Supreme Court of the State, by an appeal from a subsequent decree entered in the cause. The decisions of the Supreme Court of Tennessee hold that an appeal in a case brings up for review only the order in which it was granted.

In *Caldwell, Administrator*, v. *Hodsden*, 1 Lea 45, the rule was declared that the appeal in such a case only brings up the order in which it was granted. In that case the bill was filed by an Administrator against the widow, heirs and creditors, for the administration of the estate as being insolvent. There was a sale of land and a report of assets and liabilities which was confirmed. These decrees settled and adjudged the rights of all the parties, the cause remaining on the docket "probably for the purpose of carrying the decree into full execution." Subsequently, on motion of the widow and some of the heirs, the Clerk was ordered by the Court to proceed "to collect and distribute the funds in this cause in accordance with the orders heretofore made," and to pay the costs. Thereupon, on motion of the parties, at whose instance the decree was made, an appeal was granted "from all decrees and orders made in this cause heretofore." The Court held that the appeal only brought up such orders, judgments and decrees as in legal contemplation were appealed from, leaving all others in full force and effect. It was held that the decree from which the appeal was taken was a useless and unnecessary order; that it was the duty of the Clerk and Master without it to collect and distribute the funds in accordance with the previous orders, and that the Court erred in ordering the costs to be paid out of the funds then in Court. The Court said:

> "The order thus made does not purpose to settle any right, determine any principle involved in the litigation, or order an account, sale, or partition of property. It is not, therefore, a decree upon which the Chancellor was authorized to grant an appeal under the Code, Sec. 3157, nor a final decree from which the parties would have the right to appeal under Section 3155. It was, in fact, a useless and unnecessary order, for it was the duty of the Clerk and

Master, without it, to collect and distribute the funds in the cause in accordance with previous orders, and the court erred in ordering the cost of it—this proceeding—to be paid out of the funds then in court. At most, it was an order upon a reservation of further directions, to carry a former order or decree into effect. But the settled law is, that an appeal against an order on further directions will not bring up the decree upon which the order was founded. *Beaven* v. *Mornington*, 8 H. L. Cas. 525, 540. An appeal, this court has said, only annuls or vacates, and, of course, only brings up such orders, judgments, or decrees as, in legal contemplation, are appealed from, leaving all others in full force. *Gilchrist* v. *Cannon*, 1 Cold. 590. And the rule was applied in an administration suit like the present, at the January term, 1877, at Nashville, in the case of *Porter* v. *McNairy*, the opinion being delivered by Judge McFarland.

"The appeal in this case only brings up the order in which it was granted, and as there was error in it in the matter of the costs, it will be reversed in that regard, affirmed in other respects, and the cause remanded to the court below. The appellants will pay the costs of the order and of this court."

The same rule was reaffirmed in *Hicks & Porter* v. *Porter*, 6 Pick. 1. There the executors of an estate had obtained by a bill against the devisees and legatees a discharge as such, and by direction of the Court delivered the entire trust estate, consisting of notes, stocks, etc., into the Clerk and Master's hands. On December 12, 1888, a decree was entered in the cause upon the suggestion of the Executors, ordering the guardian *ad litem* and solicitor for the infant defendants to institute suit for the collection on one of these notes belonging to the estate. At a subsequent term the guardian *ad litem* upon his petition filed in the original cause was allowed a fee for this serv-

ice, in addition to what had been allowed for services rendered in the original cause. A decree was entered on June 24, 1890, confirming the report of the Clerk and Master allowing the fee to the guardian *ad litem* as a reasonable fee. From the latter decree there was an appeal. The Court said:

> "The decree directing the bill for the foreclosure of the Crutcher mortgage to be filed by the guardian *ad litem* was rendered December 12, 1888, and no appeal from it was prayed. The appeal which was taken in this case was from the decree of June 24, 1890, and it confers no authority upon us to examine into the correctness of the decree of December 12, 1888. *Gilchrist* v. *Cannon*, 1 Cold. 590; *Patterson* v. *Arnold*, 4 Cold. 368, 369; *Caldwell* v. *Hodsden*, 1 Lea 46, 47.
>
> "The filing of the transcript in this Court, without application for a writ of error to review the decree of December 12, 1888, confers no jurisdiction upon this Court to examine into the correctness of said decree. *Wooten* v. *Daniel*, 16 Lea 156."

So, in this case the prayer for and allowance of an appeal from the decree entered on March 1st, 1944 (long after the time for an appeal from the decree of December 10th, 1943), conferred no jurisdiction upon the Appellate Courts to examine the correctness of the former decree.

H. E. Grant should have made an appeal from the decree entered on December 10th, 1943 (R. p. 50), if he was aggrieved thereby. So far as he was concerned, this was the final decree; and since it was adjudged that those contract holders who did not have cash surrender values could not participate, it was final as to all of them, including Grant.

An order of reference had been entered by the Chancellor on July 23rd, 1943 (R. p. 44). By this order the

Clerk and Master was directed to make and file a report showing the contract holders, the amount of payments on each contract, the amount of cash surrender values and any loans or additional credits as to each contract. The report of the Clerk and Master and Special Commissioner was filed on October 15th, 1943 (R. p. 45). This report listed H. E. Grant as the holder of two contracts on which payment of $105 on each contract had been made. It showed that there was no surrender value on either contract (R. p. 47). The Clerk and Master further reported in response to Item (f) of the order of reference that there was a large number of claimants who had made comparatively few payments and who would be entitled to nothing if the distribution should be fixed on the basis of the reserve or surrender value of their contracts (R. p. 50).

The Chancellor's opinion, filed on December 9, 1943, adjudged that the deposit fund in the State of Tennessee "was in the nature of a trust fund for the benefit of those who had acquired values under their contracts with the Fidelity Assurance Association and to the extent of those values." It was further adjudged that the mere fact that a contract holder had a right of action against the Company under his contract at the time of the receivership did not entitle him to participate as a lienor against the fund (R. p. 59).

The Chancellor's decree pursuant to his opinion was entered on December 10th, 1943. This decree shows on its face that the cause had come on to be heard "upon the regular call of the docket, and the questions and issues raised with regard to the basis of distribution of the fund in the hands of the Clerk and Master as Special Commissioner." It specifically adjudged that the fund would be distributable among the holders of contracts who were

residents of the State of Tennessee on April 11th, 1941, whose claims had been filed in the cause, "*pro rata* according to the respective cash surrender values on said contracts as of April 11th, 1941" (R. p. 50). The decree further directed the Clerk and Master to make and file another report showing the contract holders who would be entitled to participate in the distribution according to the principles stated in the decree and the amount of their respective claims (R. p. 51).

The further report of the Clerk and Master made in response to this order showing the cash surrender values on the contracts entitled to participate in the distribution in no way affected the claim of H. E. Grant. The issue of his right to participate in the fund on the theory that he had a right of action against the Company for *non quantum meruit* to recover his payments was expressly decided against him on December 10, 1943, as fully and specifically as it ever could be decided against him by the Chancellor. On the principles declared by the Supreme Court in *Battle et al.* v. *National Life & Accident Insurance Company, Supra,* upon the expiration of thirty days from the date of that decree, this issue was not subject to review by the Chancellor. Grant, however, by virtue of Section 9038 of the Code of Tennessee[2], could have prayed an appeal from this decree. It settled his right although the case remained undisposed of as to others.

The decision of the Court of Appeals that the decree of December 10th was an interlocutory decree which was brought up for review by appeal from the decree of March 1st, 1944 (R. p. 103), completely ignores the fact that the decree of December 10th, 1943, was final as to H. E. Grant.

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[2]This statute allows any party to appeal from a decree in equity which settles his right, although the case may not be disposed of as to others.

He could have appealed from that decree. *Kyle et al.* v. *Marcom et al.*, 181 Tenn. 57, 178 S. W. 2d 618. As no appeal will lie from an order for a *venditioni exponas*, intended to carry into effect a final decree not appealed from (*Pond* v. *Prigg*, 5 Heisk. 532), so the decree of March 1st, 1944, which decree carried into effect the decree adjudging that the fund belonged to the holders of contracts having cash surrender values, was not one which H. E. Grant was entitled to have reviewed.

These respondents assigned error on this point in their petition to the Supreme Court of Tennessee (R. pp. 123-124). The Supreme Court ignored this assignment of error.

The question presented to this Court is whether the Supreme Court of Tennessee was *without jurisdiction* to set aside the decree entered by the Chancellor on December 10th, 1943, adjudging that the fund was distributable only to those contract holders having cash surrender values on their contracts. We respectfully insist that the decision of the Supreme Court was not one which was simply erroneous or irregular; but according to its own very recent decision in *Battle* v. *National Life & Accident Insurance Company, Supra*, it acted illegally and in excess of its jurisdiction in reviewing the Chancellor's decree of December 10th, 1943.

II.

Respondents entered into a contract with Fidelity Assurance Association by which Fidelity agreed to create and maintain a reserve fund as a special fund solely for the discharge of its liabilities under the contracts. This fund was to be set aside from payments received on the contracts. It was to be in such amount as together with interest thereon compounded annually at the rate of four and one-half percent per annum, would at any

and all times equal or exceed the amount of "cash payment liabilities of the Association under the terms of such contracts" (R. p. 13).

The Company further contracted that the fund, together with interest, would be sufficient "to meet the liabilities" under the contracts. The reserve fund was to be invested in approved securities and deposited in trust as required by the laws of the State of West Virginia (R. p. 13).

The laws of the State of West Virginia required a deposit to be made there by Fidelity equal to the cash liability of the Company on all contracts which it had sold, except for those contracts in States which had their own deposit laws. *Fidelity Assurance Association* v. *Sims*, 318 U. S. 608, 53 S. Ct. 807, 87 L. Ed. 1032.

Before Chapter 209 of the Tennessee Public Acts of 1939 was enacted, the reserve fund was impressed with a lien or trust for the satisfaction of the Company's liabilities under its outstanding contracts (R. p. 171). Its liabilities were the cash surrender values. Fidelity was not under any liability to refund payments. The reserve fund was to be created out of payments. There was no other source for the reserve fund. All contract holders became a party to this investment scheme and had knowledge of the contractual provisions. They were written into the face of the contracts.

A subsequently enacted statute of Tennessee requiring the reserve fund to be held for distribution on a different basis after insolvency of the Company, impairs the obligation of the contracts.

The construction which the Tennessee Supreme Court has given Chapter 209 of the Public Acts of 1939 does not merely affect respondents' remedy. It diminishes their substantive rights under their contracts, reducing

the value of the security held for the discharge of their contracts.

Before receivership of Fidelity on April 11, 1941, respondents and the other contract holders in Tennessee having a cash surrender value had the right to have the fund deposited in Tennessee appropriated for the payment of their cash surrender values. They had acquired vested contract rights. These rights are unconstitutionally impaired when the statute is construed so that the fund is distributable to compensate all contract holders (except those in default for more than a year) for the "loss they have suffered by reason of the insolvency of Fidelity on a pro-rata basis." By the contracts, which all contract holders are bound by, the fund was not created for that purpose but to enable the Company to fulfill the contracts *according to their terms*. The change of basis diminishes respondents' security by allotting a part of the fund to those for whom no security was required under the terms of the contract, and by increasing the distributable share of others, *i. e.*, those with a proportionately low cash surrender value, in the fund.

Respondents Brooks and Maloney had both completed their payments under their contracts. The fund for the discharge of their contracts had been set aside by the Company. It cannot be appropriated after insolvency, to enable other contract holders to recover their payments. Respondent Palmer, although he had not fully completed his payments, had acquired valuable rights in the security. The obligations of his contract are likewise impaired by a disregard of the security or reserve fund provisions of the contracts which the opinion of the Tennessee Supreme Court necessitates.

The question of impairment of their contracts was raised by respondents by their petition for rehearing in

the Supreme Court of Tennessee (R. p. 155). The Supreme Court then rendered an opinion on this petition holding that there was no impairment, on the ground that Chapter 209 of the Public Acts of 1939 (the deposit statute) did not make provision for security for investment contracts previously outstanding or in existence when the Act took effect (R. p. 161).

Respondents then filed a second petition for rehearing (R. p. 168). The Supreme Court then filed another opinion saying that the language in its second opinion was "ill-advised and is recalled, and for nothing held to the extent we proceed to indicate" (R. p. 180).

The third opinion of the Supreme Court further states:

> "In the opinion disposing of the first petitions to rehear the Court said, in substance, that Chapter 209 of the Acts of 1939 applied only to certificates issued since the enactment of that statute, the statute being signed by the Governor March 10, 1939. This ruling was a dictum and an expression upon a question which was not presented and could not be presented on the record before us. Such ruling is withdrawn and not hereafter to be considered for any purpose."
>
> (R. p. 181.)

The Court, however, reaffirmed its former holding that all contract holders who had made payments were entitled to participate in the distribution of the fund, regardless of whether they had cash surrender values under their contracts.

Respondents respectfully submit that this decision of the Supreme Court, in that it finally adjudges that contract holders without cash surrender values are entitled to share in the fund, decides the question of im-

pairment adversely to the insistence of respondents, and is a denial of their constitutional rights.

CONCLUSION.

This case is of great public importance. The rights of many thousands of Fidelity contract holders are involved. As the brief of the West Virginia Receivers brings out, in the other States in which Fidelity's assets were deposited in trust for contract holders, a uniform basis of distribution has been carried out. A final distribution of the assets in West Virginia, of necessity, must be held up until the issues involved in the Tennessee litigation can be settled. If the decision of the Supreme Court stands, other collateral matters will have to be litigated (See Petition of Mrs. Nell Godwin Oman and Greg Oman, R. p. 170).

The questions presented are important and warrant consideration by this Court. It is, therefore, respectfully submitted that the petition for certiorari should be granted.

FYKE FARMER,

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